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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

UNION PACIFIC RAILROAD
COMPANY – PETITION FOR
DECLARATORY ORDER

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) Finance Docket No. 35504
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**REPLY COMMENTS OF
DYNO NOBEL INC.**

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Dated: March 13, 2012

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Dyno Nobel Inc. (“DNI”) hereby submits the following Reply Comments in response to the Surface Transportation Board’s December 12, 2011 Decision instituting a proceeding concerning the request of Union Pacific Railroad Company (“UP”) for a declaratory order regarding Items 50 and 60 of UP Tariff 6607, “General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad” (“UP Indemnity Tariff”). Since the opening comments of DNI and other shippers and shipper trade associations were consistent, and did not vary significantly, DNI’s Reply Comments will focus on the opening comments of the UP and the other participating railroad parties.¹

DNI explained in its Opening Comments that, rather than presenting a discrete dispute between UP and one of its customers as UP had posited in its initial petition, UP’s petition in reality is a thinly veiled attempt to obtain a broad, abstract policy pronouncement from the Board for all carriers to use in an attempt to limit their common carrier obligation to transport toxic by inhalation hazardous materials (“TIH”)

¹ DNI also hereby supports the Joint Reply Comments of the American Chemistry Council, The Chlorine Institute, the Fertilizer Institute, and the National Industrial Transportation League being filed in this docket on this date.

traffic. DNI Opening Comments (“DNI Op.”) at 2. Any doubt about this fact was erased on opening, with UP failing in 70+ pages of argument and testimony to even name the involved shipper or the facts in dispute that supposedly gave rise to this proceeding, and all other participating railroads advocating that the Board issue a broad declaration that would apparently then be used by other railroads to seek to impose similarly expansive tariff provisions on all TIH shippers and possibly others.

Also, the railroads now candidly admit that this initiative seeks to drive TIH traffic volumes off of the railroads’ systems by seeking to force businesses that manufacture essential products to abruptly “chang[e] production process[es],” “us[e] nearby suppliers or engag[e] in product swaps to limit the distance that TIH must be transported” and thereby “reduc[e] TIH transportation.” *See e.g.*, Opening Argument and Evidence of UP (“UP Op.”), Verified Statement (“V.S.”) of Diane K. Duren (“V.S. Duren”) at 6; *Accord* Opening Comments of BNSF Railway Company at 3; Comments of Canadian Pacific Railway Company at 6-7. However, as stated below, these railroads’ “product swap” arguments are clearly a ruse, designed to create cover for their latest initiative to end-run the common carrier obligation for the movement of TIH commodities, which the Board should continue to strongly reject here. *See, e.g.*, *Common Carrier Obligation of R.Rs. – Transp. of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served Apr. 15, 2011) at 4 n.8 (STB denies the Association of American Railroads’ request that the Board issue a policy statement addressing TIH liability sharing arrangements).

Nothing the railroads have said in their opening comments challenges any of the essential facts and arguments DNI and other shippers made on opening demonstrating the unreasonableness of UP's Indemnity Tariff. In fact, the railroads' comments only serve to further confirm the unreasonableness of UP's Tariff.

A. The Railroads Continue to Fail to Demonstrate a Valid Need for One-Sided Indemnification Terms

The railroads repeatedly assert that the UP Indemnity Tariff is merely about "liability sharing" (Comments of the American Association of Railroads at 6, 7) or alternatively stress that the tariff is necessary because TIH shippers "bear none of the consequences" of potential liability and that liability burdens from accidents have been "disproportionately borne" by railroads "for decades." UP Op. at 18, *Id.*, V.S. Duren at 14. However, as DNI stressed on opening, there already is liability sharing under bi-lateral, traditional indemnity arrangements:

Under traditional, bi-lateral indemnity arrangements commonly used by railroads and shippers applying on all commodities (TIH or otherwise), generally each party has agreed to indemnify one another from and against liability resulting from acts or omissions of each party (*i.e.*, from each other's negligence), with liability in the event of any third party fault, joint negligence, etc. determined under governing negligence/tort law principles.

DNI Op., V.S. Sandy Rudolph ("V.S. Rudolph") at 4. DNI has been in existence for 150 years, and has been moving TIH products by rail for 50 years or more, and the traditional,

bi-lateral liability sharing arrangements have never created a major dispute or any commercial disruptions with its railroad service providers. *Id.* at 5.²

The railroads also continue to assert the purported urgent need to pass on to their customers the TIH transportation risks that are allegedly beyond the control of the railroads, which risks the railroads vaguely assert “can be caused by natural disasters, activities of third-parties, or non-carrier equipment failures (such as a leaky or improperly sealed valve on a tank car).” UP Op., V.S. Duren at 3. However, as DNI demonstrated in its Opening Comments, the railroads are already largely protected from such state common law tort liability under the preemption provisions of the Federal Railroad Safety Act (at 49 U.S.C. § 20106), and also because of the need for any potential plaintiff bringing a common law tort claim to establish proximate causation in a negligence action.

Additionally, insofar as the railroads’ charge that an accident might occur as a result of non-carrier equipment failures (*e.g.*, a negligently sealed tank car valve), the railroads are already fully covered under traditional, bi-lateral indemnification rules, as DNI clarified in its Opening Comments:

For example, if a shipper has responsibility for and negligently seals a tankcar, which negligence leads to a cargo accident/spill en route, and liability is imposed on the involved railroad provider, then the shipper could be subject to an indemnity claim by the involved railroad. Likewise, if a

² In an attempt to support the reasonableness of its Tariff, UP asserts that much of its TIH traffic already moves under contracts incorporating the terms of the UP Indemnification Tariff which UP asserts has gained “broad commercial acceptance” from customers. UP Op., V.S. Duren at 14. However, contrary to UP’s generalized assertions, the Tariff is actually being thrust on customers as “a largely non-negotiable term,” in instances where the railroad “clearly ha[s] one-sided bargaining power.” DNI Op., V.S. Rudolph at 6-7.

railroad negligently inspects a train's brakes, which negligence leads to an accident/spill en route, and liability is imposed on the involved shipper, then the railroad could be subject to an indemnity claim by the involved shipper. If a third party were deemed at fault, and negligence/fault was not assigned to either party, then each party would be responsible for their own costs, fines, expenses, etc. resulting from any resulting litigation.

DNI Op., V.S. Rudolph at 4.

Other than posit broad, hypothetical "what ifs," the railroads have not provided any specific evidence of accidents occurring outside of a railroad's control (*e.g.*, "automobiles running into sides of moving trains" or "unexpected flooding") where a railroad was not acting negligently, yet still faced serious and burdensome liability judgments under state tort law.

B. The Railroads' "Product Swap" Ruse

The "product swap" and similar assertions made by the railroads are baseless and reveal an ignorance of the involved commercial products and markets. For example, as DNI stated on opening, DNI uses anhydrous ammonia as a basic and essential raw material in the manufacture of industrial explosives and nitrogen fertilizers, which products have no practical alternatives. DNI Op., V.S. Rudolph at 1-2. DNI's largest plant, in Cheyenne, Wyoming, is already "the nearest and lowest-cost facility manufacturing industrial mine explosives" used in the nearby Powder River Basin ("PRB") coal fields, "and the PRB mines require large amounts of industrial explosives for coal mining production purposes." *Id.* at 3. However, DNI must obtain much of its

anhydrous ammonia from sources in the Gulf Coast, because this is the area of the country where most of the production is sourced. *Id.* at 2.

As much as the railroads would apparently like to dictate the Nation's flow of commerce, which industrial or consumer products are made, where such products are made, and how shippers should source essential commodities, there is no basis for railroad assertions that shippers are hoisting on the railroads any new or unfair demands to transport TIH products. TIH shippers already have full incentives to minimize shipments (and shipment lengths) of TIH where feasible, reasonably site plants, and engage in product substitution of TIH products, where possible. The UP Indemnity Tariff is unreasonable because it subjects shippers to unreasonable liability risk even where they undertake efforts to minimize TIH shipments or lengths of haul, it "puts in serious jeopardy DNI's ability to move an essential business commodity by rail," and it thus "simply goes too far." DNI Op., V.S. Rudolph at 7, 5.

Further, it is not the place of railroad managers, or the Board, to seek to make unilateral changes to entire industries requiring essential railroad service through transparent initiatives seeking to end-run the common carrier obligation, and which would not further safe transportation service. As stated by the STB's predecessor, the ICC, in similar circumstances:

To make rates for transportation based solely upon the ability of the shipper to pay those rates is to make the charge for transportation depend upon the cost of production rather than upon the cost of carriage – to measure a public service by the economies practiced by the private shipper. This necessarily gives to the carrier the right to measure the amount of profit which the shipper may make and fix its rate upon the *traffic*

manager's judgment as to what profit he will be permitted. This theory entitles the railroad to enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings but solely with respect to the earnings of those whose traffic it carries. *This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads.*

That nothing stands in the way of extortion excepting the fair-mindedness of the railroad traffic manager is illustrated in this case”³

DNI respectfully submits that the Board should strongly resist allowing the overt “regulation of the industries and commerce of the country by its railroads” by rejecting the UP Indemnity Tariff.

C. The Board Has No Authority to End Run Federal and State Statutory and Common Law

DNI stated on opening that it appears that a principle purpose of the UP Indemnity Tariff is to provide UP with a vehicle to attempt to side-step liability and contribution assignments established under statutory or state common law. *See* DNI Op. at 11-12. UP confirms on opening that it intends to use any Board decision approving its Tariff in efforts to overrun certain state and federal liability and contribution schemes that UP finds disagreeable (*e.g.*, in Texas and Illinois, and under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Clean Water Act). *See* UP Op. at 6-7. This is an alarming proposition.

The Board has no authority to end run state common law and competent governing statutes and assign liability to shippers where the law and legislators have

³ *In re: Investigation of Advances in Rates by Carriers in W. Truck Line, Trans-Miss. & Ill. Freight Comm. Territories*, 20 I.C.C. 307, 350-51 (1911) (emphasis added).

already assigned responsibility to carriers. *See, e.g., United States v. Atl. Research Corp.*, 551 U.S. 128 (2007) (Supreme Court addresses when and whether private parties can assert claims for the recovery of response costs or contribution under Sections 107 and 113 of CERCLA); *Engval v. Soo Line R.R.*, 632 N.W.2d 560 (Minn. 2001) (contribution or indemnity (if available under applicable state law) are not preempted by any federal law theory of preemption); H.R. Rep. No. 104-422, 1995 U.S.C.C.A.N. 850, 853 (House-Senate Conference Report to Interstate Commerce Commission Termination Act clarifies that preemption is confined to “remedies with respect to rail regulation – not State and Federal law[s] generally” that “do not generally collide” with the STB’s economic regulatory authority).

CONCLUSION

For the reasons set forth in DNI’s Opening Comments and these Reply Comments, the UP Indemnity Tariff is clearly unreasonable and contrary to the public interest, and should be rejected.

Respectfully submitted,

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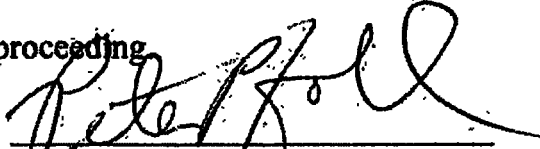
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Dated: March 13, 2012

Attorneys for Dyno Nobel Inc.

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of March, 2012, I have caused copies of the forgoing to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding


Peter A. Pfohl